

STATE OF MICHIGAN
COURT OF APPEALS

THERON E. HUGHES,

Plaintiff-Appellant,

v

ARTHUR TIMKO,

Defendant-Appellee.

UNPUBLISHED

August 2, 2007

No. 255229

Washtenaw Circuit Court

LC No. 03-000598-NZ

ON REMAND

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

BORRELLO, J. (*dissenting*).

The majority opinion deals a stunning, analytically flawed blow to the First Amendment's crucial guarantee of and protection of every citizen's right to free speech. Furthermore, in doing so, this Court, yet again, engages in fact-finding to achieve its desired result. By providing this Court's judicial stamp of approval on defendant's violation of plaintiff's First Amendment rights, this Court has created a further erosion of the protections guaranteed by the First Amendment, and by finding, not as a matter of fact, but rather as a matter of law, that whatever reasons an employer provides for discharge must be accepted as true, this Court has also usurped plaintiff's constitutional right to a trial by jury. Because such holdings are intolerable to the Constitutions of the United States and the State of Michigan, I vehemently dissent.

In *Garcetti v Ceballos*, 547 US ____; 126 S Ct 1951, 1960; 164 L Ed 2d 689 (2006), the United States Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." This holding, upon which the majority in the present case now relies to uphold defendant's violation of plaintiff's First Amendment rights, effectively removed an entire category of speech from the protection of the First Amendment.¹ Despite *Garcetti*'s restrictive First Amendment holding, I

¹ There is much irony, of course, in the majority's reliance on *Garcetti* to affirm defendant's termination of plaintiff's employment based on plaintiff's exercise of his constitutional right to free speech given that the speech at issue was decidedly pro-President George W. Bush, and, but for Bush's appointment of Supreme Court Justices, plaintiff would still have a cause of action.

wholeheartedly disagree with the majority's conclusion that *Garcetti* compels this Court to affirm the trial court's grant of summary disposition in favor of defendant.² Contrary to the majority's conclusion that plaintiff's speech was made pursuant to his job duties, I would hold that, at the very least, there is an issue of fact regarding whether plaintiff's speech was made pursuant to his official duties. The majority, in concluding that plaintiff's speech was made pursuant to his official duties as host of the radio music show, completely disregards evidence establishing an issue of fact regarding whether plaintiff's speech was made pursuant to his official duties. For this reason, the majority's "analysis" is flawed.

Plaintiff was the host of an evening music radio show. Clearly, in addition to playing music, speaking on the air was part of his job assignment. In fact, due to the nature of his job as host of the music show, plaintiff's on air speech was an integral part of his job. Nevertheless, the fact that speaking on the air was generally part of his job duties does not compel the conclusion that the specific speech at issue was made pursuant to his employment duties. As the Supreme Court recognized in *Garcetti*, "[t]he First Amendment protects some expressions related to the speaker's job[.]" and "employees retain the prospect of constitutional protection for their contributions to the civic discourse." *Id.* at 1959, 1960. I would conclude that there is an issue of fact regarding whether plaintiff's speech was related to his job, thus precluding summary disposition based on *Garcetti*. Defendant established a neutrality policy that provided that "staff must maintain total neutrality in news and public affairs programs" and that "staff members never express personal opinions or editorial views on the air." In addition, an e-mail that defendant sent out to all of the radio station employees explicitly prohibited employees from "express[ing] an opinion on matters of controversy" and specifically identified the United States' retaliation against terrorists as a matter of controversy. Because defendant explicitly prohibited plaintiff and any other employee from engaging in speech or opinions that were not neutral, the speech at issue, which was not neutral and which included plaintiff's comments in support of President Bush and the war in Iraq and his comments criticizing NPR's coverage of the war in Iraq, was not included as part of plaintiff's job assignment. To the contrary, it was explicitly excluded. Although the Supreme Court in *Garcetti* stated that employers cannot restrict employees' rights by creating excessively broad job descriptions, it did not forbid employers from expanding employees' rights under the First Amendment with written job descriptions or other written documents limiting employees' official duties. At a minimum, the existence of the radio station's neutrality policy and the e-mail create an issue of fact regarding whether plaintiff's speech was related to his job and preclude summary disposition based on *Garcetti*.

The majority concludes that "plaintiff's statements do not appear to have been made in an effort to stimulate public dialogue" but "could easily be construed as an expression of his own personal disputes and grievances pertaining to defendant's imposition of new policies and procedures" I cannot fathom how plaintiff's statements in support of President Bush and the war in Iraq could be construed as an expression of plaintiff's disputes and grievances

² I would note that even under *Garcetti*, plaintiff's speech was protected under the First Amendment whether his political views leaned to the right or the left and whether his speech was in support of President George W. Bush and the United States' war with Iraq or against it.

regarding defendant's policies. Furthermore, it is astonishing to me that the majority would conclude that plaintiff's statements regarding President Bush and the war in Iraq are not matters about which there is public dialogue. The majority isolates certain comments made by plaintiff in which plaintiff, on the air, defies defendant's policy requiring him to run the NPR news, thus ignoring the real speech at issue, which is plaintiff's speech regarding President Bush and the war in Iraq.³

The Supreme Court specifically recognized in *Garcetti* "a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id.* at 1957. Clearly, the American public is interested in and concerned about the military presence of the United States in another country. The policies of a president's administration and the operations of the United States government are unquestionably matters of public concern. See *Rankin v McPherson*, 483 US 378, 386; 107 S Ct 2891; 97 L Ed 2d 315 (1987). Since the inception of the war in Iraq, there has been a constant stream of public dialogue regarding this topic. Americans have very strong views and opinions regarding this issue, and those with opposing views on the war in Iraq frequently clash over the topic. At best, the majority's suggestion that plaintiff's speech was merely an expression of plaintiff's "personal disputes and grievances pertaining to defendant's imposition of new policies and procedures" is narrow and over-simplified; at worst, the majority, in an effort to divert attention from plaintiff's speech deserving of First Amendment protection, intentionally disregards the real speech at issue in an effort to mask the majority's desire to reach its intended result.

The majority asserts that plaintiff's speech did not concern the type of speech which typically would merit First Amendment protection, such as speech involving the disclosure of mismanagement, fraud or other whistleblower-type wrongs. I disagree and believe that the speech at issue merits just as much, if not more, First Amendment protection as the types of speech described in the majority opinion. In this regard, I would underscore that the speech at issue took place in an academic setting, as plaintiff was working for the radio station of a public university when he made the speech at issue. Like the types of speech mentioned by the majority, I would afford plaintiff's speech First Amendment protection because an academic

³ I agree that the First Amendment would not insulate plaintiff from being terminated from his employment if he disobeyed a directive from his employer to run the NPR news during his music show. However, a memorandum from defendant to Eastern Michigan University's Vice-President for University Relations listed two reasons for defendant's termination of plaintiff's employment as host of the radio show: first, plaintiff violated the radio station's policy prohibiting employees from expressing their opinions on controversial subjects when he expressed his support for the United States' military involvement in Iraq; and second, plaintiff "denigrated" NPR news and failed to air six minute hourly NPR newscasts that the radio station had scheduled to provide its listeners with continual coverage of the war in Iraq. In my view, the fact that this memorandum includes two reasons for the termination of plaintiff's employment, and one of those reasons is based on plaintiff's controversial speech, shows that there is an issue of fact regarding whether the true reason for defendant's termination of his employment was based on his controversial speech or his failure to air the NPR newscasts.

setting is a particularly appropriate venue for a free exchange of ideas and dialogue regarding important and controversial public issues.

In sum, I dissent from the majority opinion. At a minimum, plaintiff established an issue of fact regarding whether his speech was made pursuant to his job duties. In my view, the majority opinion misapplies *Garcetti* and fails to adequately analyze the real speech at issue, which is plaintiff's speech in support of President Bush and the war in Iraq. As a result of the majority's opinion, defendant's wrongful firing of plaintiff based on plaintiff's exercise of his First Amendment right to free speech is allowed to stand. The majority opinion further dilutes the protections afforded by the First Amendment and underscores Thomas Jefferson's warning that the judiciary, originally intended to be the most harmless branch of government, is in some cases the most dangerous.

/s/ Stephen L. Borrello